(1) - 89-807

No.

Supreme Court, U.S.
FILED
NOV 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

KEITH L. CLINE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

RICHARD F. O'HAIR
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332
(202) 767-1562
Counsel of Record

BERNARD E. DOYLE, JR.
Captain, Office of The Judge Advocate General
United States Air Force
Counsel for Petitioner

NOVEMBER 1989

QUESTION PRESENTED

Whether Congress intended to permit military courts-martial to have *in personam* jurisdiction over reservists prior to their reporting for active duty.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and Regulatory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	8
Appendix A	1a
Appendix B	10a

TABLE OF AUTHORITIES

Cases:

Allen v. Grand Central Aircraft Co., 347 U.S. 534, 98 L.Ed.2d 933, 74 S.Ct. 745 (1954)	4
National R. Passenger Corp. v. National Ass'n of R. Passengers, 414 U.S. 453, 38 L.Ed.2d 646, 94 S.Ct. 690 (1974)	6
United States v. Cline, 29 M.J. 83 (C.M.A. 1989)	1, 3, 6, 7
United States v. Cline, 26 M.J. 1005 (A.F.C.M.R. 1988)	1, 3
Vason v. United States, 369 F.Supp. 1202 (N.D. Ga. 1973) *aff'd* 491 F.2d (5th Cir. 1974)	6

Constitutional, Statutory and Regulatory Authorities:

United States Constitution, Article I, Sec. 8	2
10 U.S.C. § 867(h) (Supp III 1985)	1
10 U.S.C. § 1074a (1986)	5
10 U.S.C. § 1086(c) (1986)	5
10 U.S.C. § 1475(a) (1986)	5
10 U.S.C. § 1476(a) (1986)	5
10 U.S.C. § 1480(c) (1958)	6

Statutory and Regulatory Authorities – Continued: Page

28 U.S.C. § 1259(3) (Supp III 1985) 1
38 U.S.C. § 106(d) (1986) 6
44 Comp. Gen. 408 (1965) 6
54 Comp. Gen. 523 (1974) 6
Article 2(a), U.C.M.J., 10 U.S.C. 802(a) 3, 4, 5, 7
Article 2(a), The Articles of War, (Sec. 1, ch. II, Act of June 4, 1920 (41 Stat. 787), as amended.) . 5
H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949) ... 5
S. Rep. No. 486, 81st Cong., 1st Sess. (1949) 5, 6
DODPM, Part VIII, Ch. 2, Sec. B, Para. 80211 ... 6
AFR 35-67, para. 1-2b(1) 6
Uniform Code of Military Justice: Hearings Before a Subcomm. of the Comm. on Armed Services; House of Representatives, 81st Cong., 1st Sess. on H.R. 2498 (1949) 4, 5

Miscellaneous:

Winthrop, *Military Law and Precedents*, (2d Ed. 1920) 5

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

KEITH L. CLINE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Keith L. Cline, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 29, 1989.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 29 M.J. 83 (C.M.A. 1989) (Appendix A). The opinion of the Air Force Court of Military Review is reported at 26 M.J. 1005 (A.F.C.M.R. 1988) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 29, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article I, Section 8 of the Constitution of the United States provides in relevant part:

> *Section 8.* The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

Article 2 of the Uniform Code of Military Justice, 10 U.S.C. § 802 provides in relevant part:

> (a) The following persons are subject to this chapter:
>
> > (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

STATEMENT OF THE CASE

The petitioner, an Air Force Reserve Staff Sergeant (E-5), was tried by a special court-martial in a judge alone trial at Norton Air Force Base, California on June 17, 1987 and January 29, 1988. He pled not guilty to one specification of wrongful distribution of marijuana. The petitioner was found guilty of the offense and was sentenced to a bad conduct discharge and reduction in rank to airman basic (E-1).

The distribution occurred at petitioner's residence in Highland, California at approximately 8:30 a.m. on April 25, 1987. Petitioner reported for his annual active duty training requirement at approximately 4 p.m. that same day pursuant to valid military order.

The distribution had been arranged by an informant for the Air Force Office of Special Investigations (AFOSI) who had been directed to set up the buy on that morning before petitioner reported for duty, rather than on the night before active duty was to begin. AFOSI agents searched the informant and then maintained continuous surveillance upon the informant until after the distribution.

Upon return from a two week tour of duty at Kadena Air Base, Japan, petitioner was apprehended by the AFOSI and retained on active duty to be tried by court-martial.

The United States Air Force Court of Military Review affirmed appellant's conviction by citing an Air Force strength accounting regulation and interpreting the term in Article 2(a)(1), U.C.M.J., "from the dates" to mean that the military had court-martial jurisdiction over the appellant for the entire day from 0001 hours to 2400 hours.

The Court of Military Appeals affirmed on the basis of the same strength accounting regulation and by applying the principle of statutory interpretation *expressio unis est exclusio alterius* ("expression of one thing is the exclusion of another") to the language in Article 2(a)(1).

REASONS FOR GRANTING THE WRIT

In affirming petitioner's conviction, the Court of Military Appeals has departed far from the accepted and usual course of judicial proceedings by violating the clear, controlling language and intent of the Congress concerning

the limitations of court-martial jurisdiction over reserve members of the military. The court has expanded the power of the U.S. military to exercise U.C.M.J. jurisdiction over the approximately 1,695,000 civilians who are members of the Reserves or the National Guard. In particular, the court violated the well accepted principle that whenever the legislature enacts a provision with a previous statute in mind relating to the same subject matter, and absent an express repeal or amendment, the new provision should be presumed in accord with the policy embodied in the previous statute. *Allen v. Grand Central Aircraft Co.* 347 U.S. 535, 98 L.Ed.2d 933, 74 S.Ct. 745 (1954).

The legislative history clearly shows that the drafters intended to follow precedent established under the Articles of War on when reservists would become subject to military jurisdiction. Mr. Felix Larkin, Assistant General Counsel of the Department of Defense and executive secretary to the Department of Defense committee on the Uniform Code of Military Justice, testified before the House Hearings on Article 2(a)(1):

> Now, the concluding clause in the sentence says all other than those drafted under the Selective Service Act. As to the calling in or perhaps the drafting in of the Reserves to active duty—the National Guard and any other organizations which may be called to active duty, as to them since they are already members on inactive duty and already have been sworn in, why the jurisdiction will arise from the dates they are required to obey them—I think the construction there would be when they actually report for duty or perhaps when they leave home on their way to report for duty.[1]

---

[1] *Uniform Code of Military Justice: Hearings before a Subcomm. of the Comm. on Armed Services; House of Representatives*, 81st

The Department of Defense committee which drafted the U.C.M.J. followed the Articles of War language very closely.[2] In fact, they included the words "drafted" and "draft" in the clause pertaining to calling up reservists or national guardsmen because it had been used in the Articles of War.[3] Additionally both the House and Senate reports on this legislation said that Article 2(a)(1) is an adaptation of Article of War 2(a).[4]

It is without question that under the Articles of War, reservists were not subject to military criminal jurisdiction until their arrival at their place of duty. *See* Winthrop, *Military Law and Precedents*, 95 (2d ed. 1920). Additionally, a variety of statutes, administrative regulations, and court decisions have displayed the continuing vitality of this concept since the adoption of the U.C.M.J.[5]

Cong., 1st Sess. on H.R. 2498 (1949) at p. 855. (Hereafter House Hearings).

[2] Article 2(a) of the Articles of War stated the following persons were subject to military jurisdiction: "(a) All officers, warrant officers, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance in the military service of the United States; and all other persons *lawfully called, drafted, or ordered into or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same*;" The Articles of War, (Sec. 1, ch. II, Act of June 4, 1920 (41 Stat. 787), as amended.) (Emphasis added.)

[3] See House Hearings at 858. The use of the term "draft" created a great deal of comment because although it did not apply to Selective Service inductees, many witnesses interpreted it in that manner. As a result, the Congress changed the language of the Article as it applies to volunteers and inductees and removed references to "draft" from the provision relating to Reservists and National Guardsmen in the final version of the provision.

[4] See H.R. Rep. No. 491, 81st Cong., 1st Sess. at 10 (1949), and S. Rep. No. 486, 81st Cong., 1st Sess. at 7 (1949).

[5] See 10 U.S.C. § 1074a (1986); 10 U.S.C. § 1086(c) (1986); 10 U.S.C. § 1475(a) (1986); 10 U.S.C. § 1476(a) (1986); 10 U.S.C.

The Court of Military Appeals attempted to avoid the clear intent of the Congress by applying the general principle of interpretation of statutory interpretation: *expressio unis est exclusio alterius.*[6] Their reliance on this concept was misplaced for two reasons. First, this Court has stated that even the most basic principles of statutory interpretation must yield to clear, contrary evidence of legislative intent. *National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 38 L.Ed.2d 646, 94 S.Ct. 690 (1974). The legislative intent of the Congress clearly shows that they meant the expression "from the dates when" to mean that reservists or national guardsmen are subject to the U.C.M.J. beginning at the moment they reported for duty.

Second, *expressio unis est exclusio alterius* is simply inapplicable under the circumstances presented in the legislative history. The maxim is inapplicable if there is some reason for excluding a matter which would otherwise be within the statute. Congress had clearly discernible reasons for referring to draftees and reservists in separate clauses of Article 2. The legislative history and the Senate Report clearly show that the difference in this wording exists to insure that the statute was consistent with language in the Selective Service Act of 1948.[7]

The differences in the language used in the provision as it applies to volunteers and inductees ("from the time of") against the language as it applies to other persons ("from the dates when") does not mean that Congress intended to

---

§ 1480(c) (1958); 38 U.S.C. § 106(d) (1986); AFR 35-67, para. 1-2b(1); DODPM, Part VIII, Ch. 2, Sec. B, para. 80211; 44 Comp. Gen. 408 (1965); 54 Comp. Gen. 523 (1974); and *Vason v. United States*, 369 F.Supp. 1202 (N.D. Ga. 1973) *aff'd*, 491 F.2d 1271 (5th Cir. 1974).

[6] *United States v. Cline*, 29 M.J. 83, 86 (C.M.A. 1989).

[7] See S. Rep. No. 486, 81st Cong., 1st Sess. at 7 (1949).

change the amenability of reservists and national guardsmen to the U.C.M.J. in the statute.[8] Existing law, under the Articles of War, recognized the beginning of military jurisdiction when a reservist arrived for duty. Congress sought to avoid confusion by maintaining nearly the same language in the U.C.M.J. Thus, the purpose for the different wording does not indicate a desire of the legislature to change the interpretation of the applicable language.

Also, newcomers to the military, inductees and volunteers, become amenable to the U.C.M.J. at a slightly different time than Reservists, national guardsmen and any other persons who are reporting for active duty. The newcomers are responsible under the Code only after having been sworn, not from the moment when they arrive at the place where they will be sworn. Although this time difference may often be small, it still could be an important distinction when a person has last minute second thoughts about joining the military. Therefore, the different language employed between these two classes merely clarifies the slight distinction in the amenability of the two groups to the U.C.M.J.

---

[8] In his decision, Judge Sullivan indicated that he believed that members of the National Guard are called into federal service under a different provision of Article 2, U.C.M.J. *Cline, supra* at 86. However, this is an incorrect reading of the provision. The United States calls National Guardsmen into federal service under the same provision of Article 2(a)(1), U.C.M.J. as it calls Reservists to active duty. Therefore, Judge Sullivan's efforts to distinguish the two organizations was pointless.

CONCLUSION

The petitioner submits that he has suffered a denial of due process of law. Therefore, his petition for writ of certiorari should be granted.

RICHARD F. O'HAIR
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

BERNARD E. DOYLE, JR.
Captain, Office of The Judge Advocate General
United States Air Force
Counsel for Petitioner

NOVEMBER 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 61,572
ACM S27577

UNITED STATES, APPELLEE

v.

KEITH L. CLINE, STAFF SERGEANT
U.S. AIR FORCE RESERVE, APPELLANT

September 29, 1989

Accused, a staff sergeant in the United States Air Force Reserve, was convicted by special court-martial convened at Norton Air Force Base, California, Charles E. Stevenson, Jr., J., and he appealed. Following limited hearing by the court, Linda D. Carter, J., on the issue of jurisdiction, the United States Air Force Court of Military Review, 26 M.J. 1005, affirmed. The United States Court of Military Appeals, Sullivan, J., held that member of Air Force Reserve became subject to military jurisdiction at one minute past midnight on the date on which he was to report for active duty.

Affirmed.

For Appellant: *Captain Bernard E. Doyle, Jr.* (argued); *Colonel Richard F. O'Hair* and *Major Mark R. Bell* (on brief).

For Appellee: *Captain Morris D. Davis* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

OPINION OF THE COURT

SULLIVAN, Judge:

On June 17, 1987, appellant was tried by a military judge sitting alone as a special court-martial at Norton Air Force Base, California. Contrary to his pleas, he was found guilty of wrongful distribution of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a bad-conduct discharge and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. On November 24, 1987, the Court of Military Review ordered a limited hearing on the issue of jurisdiction. After that hearing took place on January 29, 1988, the Court of Military Review affirmed the findings and sentence. 26 MJ 1005 (1988).

This Court granted review of the following issue:

> WHETHER THE COURT-MARTIAL LACKED *PERSONAM* JURISDICTION TO TRY THE APPELLANT FOR AN OFFENSE COMMITTED PRIOR TO HIS REPORTING FOR ACTIVE DUTY.

We hold that court-martial jurisdiction existed over appellant because he was a reservist on active duty at the time he committed the charged offense. *See* Art. 2(a)(1), UCMJ, 10 USC § 802(a)(1); *Duncan v. Usher*, 23 MJ 29, 34 (CMA 1986).

The facts of this case are set forth in the opinion below:

> The appellant was a reserve non-commissioned officer who, along with other members of his unit, had been called to active duty for deployment to an overseas locaton [Kadena Air Base, Japan] for a period of two weeks to satisfy reserve requirements. At approximately 0830 hours

on the morning of 25 April 1987, the date he was to report for active duty, the charged offense occurred. He pled not guilty to the charge and defended on the theory of entrapment. The military judge found him guilty as charged.

At trial, as before us, the appellant argues that the military was without [*in*] *personam* jurisdiction to prosecute him for the charged offense, as such offense was committed prior to the appellant's commencing travel to his reporting location to begin his active duty tour. To fully understand the complicated issue before us it is necessary to set forth a factual scenario.

THE AF Form 938, REQUEST AND AUTHORIZATION FOR ACTIVE DUTY TRAINING/ACTIVE DUTY TOUR, is dated 9 March 1987. Since there was no attack on this order there is a presumption that it is valid and proper. Block 11 of this order contains the reporting data. The information contained therein reads "0500 1987 APR 25." The people affected by this order include the appellant. On 5 April 1987, a briefing was conducted for all people being deployed as per the above cited order, including the appellant. Among the items discussed was the itinerary, which changed the reporting time from 0500 hours to 1600 hours on 25 April 1987. *Attendees were informed that they would be subject to the Uniform Code of Military Justice one minute past midnight on the effective date of the orders.*

Because of the change in the reporting hour, the appellant did not leave his off base residence to meet the 1600 hour reporting time at Norton Air Force Base until 1535 hours on 25 April 1987.

26 MJ at 1006-07 (emphasis added).

The evidence of record additionally establishes that the informant for the Office of Special Investigations was instructed not to purchase marijuana from appellant on the night before he was scheduled to begin active duty but to wait until the day of April 25, 1987, to consummate the transaction. Appellant was arrested for the charged offense when he returned from Japan. He was then held on active duty pending court-martial.

Appellant avers that his status as a civilian did not change until he departed his home at 1535 hours to report for active duty at 1600 hours on April 25, 1987. Accordingly, he asserts that his conduct at 0830 hours on that date was not subject to prosecution at a court-martial.

In support of this contention, he argues that Article 2, properly construed, imposes a "departure for duty" touchstone to determine when a reservist becomes subject to the military jurisdiction. He asserts that his construction of this statute is supported by its legislative history, prior practice with respect to the militia under the Articles of War, case law from other courts, and the existence of special travel pay statutes and regulations for reservists. We disagree.

To the extent that appellant perceives the critical question as one of status, he is correct. In *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), the Supreme Court recognized that military jurisdiction existed over a service-member for crimes committed on or off post as a result of his status as a member of the armed forces. Status in the armed forces for purposes of court-martial jurisdiction is generally governed by Article 2. *See United States v. Cole,* 24 MJ 18 (CMA), *cert. denied,* __ U.S. __, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987).

See generally In re Grimley, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636 (1890). Accordingly, we must turn to the applicable portions of this status to determine when appellant's status changed. *United States v. Caputo,* 18 MJ 259, 265 (CMA 1984); *United States v. Handy,* 14 MJ 202 (CMA 1982).

Article 2 states in relevant part:

> (a) The following persons are subject to this chapter:
>
> > (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; *volunteers from the time of* their muster or acceptance into the armed forces; *inductees from the time of* their actual induction into the armed forces; and *other persons* lawfully called or ordered into, or to duty in or for training in, the armed forces, *from the dates when* they are required by the terms of the call or order to obey it.
> >
> > * * * * *
> >
> > (3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army *National Guard* of the United States or the Air *National Guard* of the United States *only when in Federal service.*

(Emphasis added.) Clearly, by the express terms of this statute, a precise point of inception of jurisdiction (*i.e.*, "from the time of") exists for "volunteers" and "inductees" under Article 2(a)(1), and for National Guardsmen under

Article 2(a)(3) (*i.e.*, "only when in Federal service"). Equally as clear, a different and more general inception point (*i.e.*, "from the dates when") exists for "other persons" listed under Article 2(a)(1). Accordingly, our preliminary task is to determine appellant's proper classification under this statute.

First, we do not find that appellant was a "volunteer" within the meaning of Article 2. A "volunteer" is a person who, for a temporary purpose, fights with the regular military forces. *See* G. Davis, *A Treatise on The Military Law of the United States* 27-27a (1913); W. Winthrop, *Military Law and Precedents* 87 (2d ed. 1920 Reprint). *Cf.* Art. 2(b). Appellant had a pre-established membership in an existing military organization of the United States armed forces, and he held military rank.

Also, appellant was not a civilian involuntarily receiving his initial call to military service. He was a member of the United States Air Force Reserve who was activated for training. Hence, he is not an "inductee" within the meaning of Article 2(a)(1). *Cf. United States v. Ornelas,* 2 USCMA 96, 98-99, 6 CMR 96, 98-99 (1952); Winthrop, *supra* at 87-88.

Moreover, appellant was not a member of the Air National Guard. The Air Force Reserve is a separate organization, established under 10 USC § 261(a)(6). The Air National Guard of the United States is established under 10 USC § 261(a)(5). Pursuant to 10 USC § 261(b), "Except as otherwise provided in this title, no person may be a member of more than one reserve component at the same time." Moreover, appellant has advanced no argument suggesting any kind of dual membership.

Appellant does, however, qualify as an "other person" under Article 2. As defined, an "other person" is one who is not a member of a regular component, a volunteer, or an inductee. Moreover, he is one who may be "lawfully

called or ordered into, or to duty in or for training in, the armed forces." This is precisely what occurred. Appellant was called for active duty training, and he does not challenge the Government's lawful right to do so.

As a result of his status, appellant was subject to the Uniform Code of Military Justice and court-martial jurisdiction "from the date[ ]" he was ordered to appear for training. *See* Art. 2(a)(1). Inasmuch as the date of April 25, 1987, began one minute past midnight of April 25, 1987, he was subject to the Code and military jurisdiction from that time. *Cf.* AFM 30-130, Vol. I, Chapter 22, Section B (1986). Accordingly, as he had been previously informed, he was subject to court-martial jurisdiction at the time of his offense, 0830 hours on April 25, 1987. *See Duncan v. Usher, supra; cf. Woodrick v. Divich,* 24 MJ 147, 150 (CMA 1987).

Appellant's arguments to the contrary are unpersuasive. He has cited precatory testimony, made during the House hearings on Article 2, which tends to support a construction of "from the dates" language as imposing a departure-for-duty requirement.[1] We note, however, that this testimony applied to an earlier version of Article 2, which used the same "from the dates" language for inductees and volunteers as well. Yet, the Senate eventually imposed the more particular time requirement for jurisdiction only on inductees, volunteers, and members of the National Guard.[2] Applying the principle of statutory construction, "*expressio unius est exclusio alterius,*" *see generally 2A Sutherland Stat Const* § 47.23-25 (Sands 4th ed. 1984 Revision), members of the Reserves do not gain the benefit

---

[1] Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm. 81st Cong., 1st Sess. 855 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

[2] S.Rep. No. 486, 81st Cong., 1st Sess. 4 (1949).

Congress intended these other special groups to have. *See United States v. Douse,* 12 MJ 473, 476 (CMA 1982).

Appellant's argument that reservists are equivalent to members of the militia who were purportedly subject to a departure-for-duty requirement is equally without merit. Appellant is a member of the Air Force Reserve. *See* 10 USC § 261(a)(6). His military service is of a national character. *See* 10 USC § 262. The militia, on the other hand, primarily serves the needs of the individual states. *See* U.S. Const. amend. II; *cf. United States v. Miller,* 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); *see generally* 10 USC § 311. Accordingly, a reservist is not the equivalent of a member of the militia, so prior practice concerning the latter should not control.

Appellant's contention that case law from other sources supports his position is likewise unpersuasive. In one instance, appellant cites a decision of the Comptroller General regarding a deceased National Guardsman. 54 Comp. Gen. 523 (1974). That decision is not controlling, given the distinction made in Article 2 between reservists and National Guardsmen. *Compare* Art. 2(a)(1) *with* Art. 2(a)(3). A second Comptroller General decision also cited is not on point, for it is premised upon a statutory construction of 10 USC § 8721(2), payment of benefits. *See* 44 Comp. Gen. 408 (1965). That decision does not involve construction of Article 2. *See Pearson v. Bloss,* 28 MJ 376 (CMA 1989). Moreover, appellant's reliance on *Vason v. United States,* 369 F.Supp. 1202 (N.D.Ga.1973), *aff'd,* 491 F.2d 1271 (5th Cir.1974), is unwarranted. There, the District Court held that a reserve officer's family was not entitled to benefits when the officer died the day before his active duty date. Here, appellant was arrested for an offense committed on the day of his activation, not the day before.

Appellant's final argument is that the existence of certain statutes or regulations covering travel for reservists indicates that a departure-for-duty rule applies for court-martial jurisdiction over them. We decline to adopt appellant's strained extrapolation of these statutes and regulations. Statutes or regulations which authorize travel pay do not themselves measure status. *See Duncan v. Usher*, 23 MJ at 31. In any event, appellant was paid a full day's wage for his service on April 25, 1987. Accordingly, it is immaterial whether his actual reporting time was 0500 hours, as originally planned, or 1600 hours, as actually occurred.[3]

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX concur.

---

[3] *See* Matthew 20:12-16.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM S27577 (f rev)

UNITED STATES

v.

STAFF SERGEANT KEITH L. CLINE, FR 281-54-8380
UNITED STATES AIR FORCE

---

18 August 1988

Sentenced adjudged 17 June 1987 by SPCM convened at Norton Air Force Base, California. Military Judge: Charles E. Stevenson, Jr. (sitting alone).

Approved Sentence: Bad conduct discharge and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Mark R. Bell. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Lieutenant Colonel Morris A. Tanner, Jr. and Captain Morris D. Davis.

Before

HODGSON, FORAY and HOLTE
Appellate Military Judges

DECISION UPON FURTHER REVIEW

HOLTE, Judge:

Before a judge alone special court-martial the appellant was convicted of one charge of wrongful distribution of marijuana in violation of Article 112a, UCMJ.

The appellant was a reserve non-commissied officer who, along with other members of his unit, had been called to active duty for deployment to an overseas location for a period of two weeks to satisfy reserve requirements. At approximately 0830 hours on the morning of 25 April 1987, the date he was to report for active duty, the charged offense occurred. He pled not guilty to the charge and defended on the theory of entrapment. The military judge found him guilty as charged.

At trial, as before us, the appellant argues that the military was without *personam* jurisdiction to prosecute him for the charged offense, as such offense was committed prior to the appellant's commencing travel to his reporting location to begin his active duty tour. To fully understand the complicated issue before us it is necessary to set forth a factual scenario.

The AF Form 938, REQUEST AND AUTHORIZATION FOR ACTIVE DUTY TRAINING/ACTIVE DUTY TOUR, is dated 9 March 1987. Since there was no attack on this order there is a presumption that it is valid and proper. Block 11 of this order contains the reporting data. The information contained therein reads "0500 1987 APR 25." The people affected by this order include the appellant. On 5 April 1987, a briefing was conducted for all people being deployed as per the above cited order, including the appellant. Among the items discussed was the itinerary, which changed the reporting time from 0500 hours to 1600 hours on 25 April 1987. Attendees were informed that they would be subject to the Uniform Code of

Military Justice one minute past midnight on the effective date of the orders.

Because of the change in the reporting hour, the appellant did not leave his off base residence to meet the 1600 hour reporting time at Norton Air Force Base until 1535 hours on 25 April 1987.

To resolve the issue as to whether the military had *personam* jurisdiction to prosecute the appellant requires an analysis of procedures involved in bringing reserve personnel on active duty for their annual tour of duty. The authority for these procedures are contained in Air Force Regulation 10-7, *Administrative Orders* (Sept 86); Air Force Manual 30-130, *Base Level Military Personnel System, Users Manual,* Volume I, chapters 22, (Oct 86); and *DoD Military Pay and Allowances Entitlements Manual,* Table 1-2-1, Rule 7. It is these authorities that were used by the personnel specialists who testified at trial in explaining the various statuses of reserve personnel.

We start this analysis be defining the terms (1) self activating orders, (2) active duty status and (3) active duty service. Self executing orders are those, which if properly authenticated, require no further action to become effective. Active duty status is the customary term utilized to maintain an individual in a proper format and for accountability by the military personnel system. Active service is the term applied to the time when an individual actually reports and is ready to perform military duties.

Applying these defined terms to the evidence of record we arrive at the following conclusions. The AF Form 938, dated 9 March 1987, was a properly authenticated order. This order is what is known as a self activating or self executing order, which means that at 0001 hours, on 25 April 1987, the appellant was on active duty status. It should be noted that according to the AF Form 938, appellant's active service was to start at 0500 on 25 April 1987, however

this time was later changed to 1600 on the same date. For clarification, it is noted that duty status does not depend on duty service. There is no relationship between status and duty, however a reservist must be in status to perform duty. It is status, as opposed to duty, that determines when pay and other entitlements and benefits accrue. Although the appellant did not have to report for duty until 1600 hours on 25 April 1987, the evidence establishes that his pay and other entitlements started as of 0001 hours on that date. The 1600 hour reporting time is of no significance in determining jurisdiction. This time element is controlled by the organization and its only purpose is to determine when the member must be present to begin active duty service. It would be illogical to conclude that under these circumstances the military did not have in *personam* jurisdiction over the appellant.

Article 2(a)(1) of the Uniform Code of Military Justice states that ". . . persons lawfully called or ordered into, or to duty in or for training in the armed forces, from the dates when they are required by the terms of the call or order to obey it" are subject to the UCMJ. The appellant argues that he was not subject to the Code until 1600 hours on 25 April 1987 because that was the hour that his military duties were to begin. To accept this argument is to deny the uniformed services a means for a systematic accounting of force strength during any given 24 hour period of time. The cited code provision refers to "from the dates when they are required by the terms of the call or order to obey it." It does not refer to hours of the day or when reporting to active duty. We interpret the term "from the dates" to mean that a day is that time between the hours of 0001 hours and 2400 hours. Therefore, we conclude that at 0001 hours on 25 April the appellant was under jurisdiction of the military for prosecution purposes for the charged offense which occurred at approximately 0830 on

that morning. The assigned issue is decided against the appellant.

We have examined the record of trial and conclude that the findings of guilty and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are

AFFIRMED.

Chief Judge HODGSON and Senior Judge FORAY concur.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

U.S. GOVERNMENT PRINTING OFFICE 1989—252 264/62085

Supreme Court, U.S.
FILED
DEC 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-807

In the Supreme Court of the United States

OCTOBER TERM, 1989

KEITH L. CLINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF
ROBERT E. GIOVAGNONI
Col., OJAG, USAF
MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

QUESTION PRESENTED

Whether petitioner, a member of the United States Air Force Reserves who was ordered into active duty, was on active duty status when he distributed narcotics.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Chan v. *Korean Air Lines, Ltd.*, 109 S. Ct. 1676 (1989)	7
Garcia v. *United States*, 469 U.S. 70 (1984)	6
Grimley, In re, 137 U.S. 147 (1890)	5
Hiatt v. *Brown*, 339 U.S. 103 (1950)	7
Middendorf v. *Henry*, 425 U.S. 25 (1976)	7

Statutes and regulation:

Uniform Code of Military Justice, Art. 2(a)(1), 10 U.S.C. 802(a)(1)	3, 4, 5, 6, 7
10 U.S.C. 270(a)	2
10 U.S.C. 261(a)(6)	5
10 U.S.C. 262	5
32 C.F.R. 101.5(a)	2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-807

KEITH L. CLINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Air Force Court of Military Review (Pet. App. 10a-14a) is reported at 26 M.J. 1005. The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 29 M.J. 83.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 28, 1989. The petition for a writ of certiorari was filed on November 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a special court-martial at Norton Air Force Base in California, petitioner, a member of the United States

Air Force Reserves, was convicted of the distribution of marijuana. The court-martial sentenced petitioner to a bad conduct discharge and a reduction in rank to the lowest enlisted grade. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and the sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. On January 16, 1985, petitioner reenlisted in the Air Force Reserves for a period of eight years. For his reserve duty he was assigned to Norton Air Force Base, where he also worked full-time as a civilian employee of the Air Force. Tr. 19, 38; AX 9. On March 9, 1987, petitioner received a written order to perform annual active duty training for a period of 15 days.[1] His active duty training period was to begin on April 25 and end on May 9. Tr. 21; AX 11. The written order indicated that petitioner was to report for duty at 5 a.m. on April 25. AX 11. Petitioner attended a predeployment briefing on April 5. At the briefing, he was told to report for duty at 4 p.m. on April 25th, and he was advised that he would be subject to the Uniform Code of Military Justice beginning at one minute past midnight that day. Hearing Tr. 57, 61-62.[2]

On April 24, petitioner agreed to provide some marijuana to a military member, Senior Airman Albert Hodgson, who was in petitioner's squadron. Hodgson gave petitioner $25 for the marijuana and was to call petitioner at his home that evening to make arrangements to receive the marijuana. Tr. 69-71. Petitioner and Hodgson subsequently agreed that

---

[1] Members of a reserve component are required annually to perform a minimum of 14 days of active duty training, exclusive of travel time. 10 U.S.C. 270(a); 32 C.F.R. 101.5(a).

[2] After the court-martial adjourned, an additional hearing was held to develop evidence on the jurisdictional issue. References to that evidentiary hearing are cited as "Hearing Tr."

Hodgson would pick up the marijuana at petitioner's house on the morning of April 25. Unbeknownst to petitioner, Hodgson was assisting the Air Force Office of Special Investigations (OSI) at the time. Tr. 39. Before meeting petitioner, Hodgson and his car were searched by OSI agents, who also followed Hodgson to petitioner's house and saw the transaction take place in petitioner's yard at 8:30 a.m. on April 25. Tr. 40-41, 47, 75, 78; Pet. App. 11a.

Petitioner left his house at approximately 3:35 p.m. that day to report for his active duty tour. Hearing Tr. 69. When he returned from his overseas assignment on May 9, petitioner was apprehended by the OSI at the Norton Air Force Base passenger terminal. Tr. 16. An order was prepared continuing petitioner on active duty status pending the outcome of disciplinary proceedings against him. AX 12.

2. At trial and on appeal, petitioner argued that he was not subject to the Uniform Code of Military Justice at the time of the offense since he had not yet commenced traveling to his unit for active duty training. The trial judge rejected that claim, and the Air Force Court of Military Review affirmed on the ground that the order calling petitioner into active duty specified that it would take effect at 12:01 a.m. on April 25, 1987. Pet. App. 10a-14a. The court reasoned that the date specified in the order, rather than the time that petitioner actually left for his duty station, was dispositive, because the latter was an administrative decision made by petitioner's unit commander based upon the unit's needs. While in active duty status, the court held, petitioner was subject to the Uniform Code of Military Justice. *Ibid.*

3. The Court of Military Appeals affirmed. Pet. App. 1a-9a. The court noted that Article 2(a)(1) of the UCMJ, 10 U.S.C. 802(a)(1), confers jurisdiction over different categories of persons at different times. Volunteers are subject to the UCMJ "from the time of their muster or ac-

ceptance into the armed forces." Inductees are subject to the UCMJ "from the time of their actual induction into the armed forces." "[O]ther persons" who are lawfully called into active duty are subject to the UCMJ "from the dates when they are required by the terms of the call or order to obey it." Since petitioner fell into the last category, the court found that he was subject to the UCMJ beginning immediately after midnight on the effective date of his order to report for active duty. Pet. App. 5a-9a.

ARGUMENT

Petitioner contends that he was not subject to the Uniform Code of Military Justice when he distributed marijuana to Airman Hodgson. Petitioner's claim, however, is quite narrow. He does not argue that Congress lacks the power to apply the UCMJ to reservists while they serve the active duty component of their reserve obligation. Instead, he maintains that he was not in fact on active duty at the time in question, because he had not yet left to join his unit. That fact-bound question, which has no application beyond the military justice system, does not warrant review by this Court.

Petitioner claims that the distinction drawn by the text of Article 2(a)(1) of the UCMJ, 10 U.S.C. 802(a)(1), between persons who are deemed members of the armed forces "from the time of their muster or acceptance into the armed forces" and "from the dates when they are required by the terms of the call or order" into active duty is a distinction of no moment.[3] His position, however, is inconsistent

[3] Article 2(a)(1), 10 U.S.C. 802(a)(1), states:

> The following persons are subject to this chapter:
>
> (1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster

with the clear language that Congress used in Article 2(a)(1) and is also illogical.

Congress used different terms in Article 2(a)(1) to describe the different points at which a person becomes a member of the armed forces. Volunteers and inductees are civilians and do not become members of the armed forces until they take the oath of induction. See *In re Grimley*, 137 U.S. 147, 156-157 (1890) (a person who has enlisted in the armed forces changes his status from civilian to serviceman by taking the oath of allegiance). Reserve members, on the other hand, are by statute members of a military component, 10 U.S.C. 261(a)(6), and can be called into active duty from their reserve status by military order if the need for additional military units arises, see 10 U.S.C. 262.[4] Therefore, the terms Congress used in Article 2(a)(1) recognize the different status enjoyed by persons in these three categories and gives effect to each one: Volunteers and inductees are not subject to the UCMJ until they officially enter the military, while reservists are subject to the UCMJ from the moment they are called into active duty status; once they are in that status, reservists can be called upon to perform such duties as military needs dictate. For that reason,

---

or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

[4] 10 U.S.C. 262 states that "[t]he purpose of each reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components."

the UCMJ can properly be applied to such reservists just as it can be applied to members of the regular components of the armed forces.

Petitioner's interpretation of Article 2(a)(1) is also illogical. Under petitioner's construction of the UCMJ, reserve members could forever avoid military jurisdiction simply by ignoring an order to report for active duty. The distinction in Article 2(a)(1) between volunteers, inductees, and other persons called into duty is therefore eminently sensible. Contrary to petitioner's contention, there is a good reason to distinguish between the phrases "from the time of" and "from the dates when," as they are used in Article 2(a)(1).

Petitioner relies heavily on legislative history of Article 2(a)(1) to support his reading of its text. In particular, he invokes one passage from testimony given by Felix Larkin, Assistant General Counsel of the Department of Defense and Executive Secretary to the Department of Defense Committee on the Uniform Code of Military Justice, before a subcommittee of the House Committee on Armed Services during hearings held in 1949 on revisions to the UCMJ. Pet. 4. Mr. Larkin's view of the relevant portion of Article 2(a)(1) was that "I think the construction there would be when they actually report for duty or perhaps when they leave home on their way to report for duty." Pet. 4. Aside from the fact that the foregoing comment was directed to an earlier version of Article 2 that did not become the law, Pet. App. 7a, Mr. Larkin's tentative views on the proper construction of Article 2(a)(1) do not supply "the most extraordinary showing of contrary intentions" necessary to "justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). If Congress intended that the phrase "from the dates when" would mean the same as the phrase "from the time of," Congress would have used that clear and specific language. After

all, the two phrases are used in the same sentence. The fact that Congress chose to use two different phrases suggests that they do not have the same meaning. See *Chan* v. *Korean Air Lines, Ltd.*, 109 S. Ct. 1676, 1683 (1989) ("When such an interpretation is allowed, the art of draftsmanship will have become obsolete.").

Petitioner also errs in claiming that certain other statutes, regulations, and court decisions support his construction of Article 2(a)(1). Pet. 5. As the Court of Military Appeals explained, Pet. App. 8a-9a, those statutes, regulations, and decisions involve various administrative determinations, such as travel allowances and death benefits, that are not designed to define military criminal jurisdiction. The Court of Military Appeals, whose interpretation of the UCMJ is entitled to considerable deference, *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950), properly refused to apply petitioner's "strained extrapolation" from the cited laws and regulations to the statute at issue here. Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Col., OJAG, USAF

MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

DECEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—282-203/00633